Supreme Court, U.S.
FILED
95 1860 MAY 16 1996
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1995

RODRIGO MARTIN REYES,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

LAWRENCE B. FABACHER, II
833 Baronne Street
New Orleans, LA 70113
(504) 522-2800

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

32pp

QUESTIONS PRESENTED

The Attorney General, in her discretion, is authorized to grant asylum to an alien if the Attorney General determines that such alien is a refugee within the meaning of Title 8 Section 1101(a)(42)(A). 8 U.S.C. § 1254(a)(2). A "refugee" is a person who has been persecuted or who has a well-founded fear that he will be persecuted because of his race, religion, nationality, political opinion, or membership in a particular social group should he be returned to his country and who is unwilling or unable to return to his country because of that fear of persecution. 8 U.S.C. § 1101(a)(42)(A).

The questions presented are:

(1) Whether the ruling of the Board of Immigration Appeals in the present case declaring the Petitioner was statutorily ineligible to reopen the proceedings in order to apply for asylum was an abuse of discretion?

and

(2) Whether the Board of Immigration Appeals further abused its discretion in the present case by declaring that the Petitioner had failed to establish a well-founded fear of persecution?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Authorities iii

Opinions and Judgments Below 1

Statement of Jurisdiction 2

Statutes and Regulations Involved 2

Standard of Review 3

Statement of the Case 4

I. Basis for Federal Jurisdiction in the Court of First Instance 4

II. Statement of the Facts 4

III. Course of proceedings and disposition in the Court below 5

Argument for Allowance of the Writ 7

I. THE BOARD OF IMMIGRATION APPEALS ERRED IN FINDING THAT THE IMMIGRATION JUDGE WAS CORRECT IN DISMISSING THE PETITIONER'S REQUEST FOR ASYLUM AND WITHHOLDING OF DEPORTATION PURSUANT TO § 208 OF THE IMMIGRATION AND NATIONALITY ACT SINCE THE PETITIONER CONCLUSIVELY ESTABLISHED A WELL-FOUNDED FEAR OF PERSECUTION... 7

Conclusion 11

Appendix ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Consolidated Edison v. NLRB, 305 U.S. 197 (1938) 7

de la Llana-Castellon v. I.N.S., 16 F.3d 1093 (10th Cir. 1994) ..... *passim*

Dulane v. I.N.S., 46 F.3d 988 (10th Cir. 1995) 3

Faddoul v. I.N.S., 37 F.3d 185 (5th Cir. 1994) 7

I.N.S. v. Doherty, 502 U.S. 314, 116 L.Ed 2d 823, 112 S.Ct. 719 (1992) 3

I.N.S. v. Elias-Zacharias, 112 S.Ct. 812 (1992) 3, 7

I.N.S. v. Wang, 450 U.S. 139 (1981) 3

Limsico v. U.S. I.N.S., 951 F.2d 210 (9th Cir. 1991) 3

M.A. v. I.N.S., 899 F.2d 304 (4th Cir. 1990) (en banc) ..... *passim*

Rojas v. I.N.S., 937 F.2d 186 (5th Cir. 1991) 7

Yousif v. I.N.S., 794 F.2d 236 (6th Cir. 1986) 9

Zamora-Morel v. I.N.S., 905 F.2d 833 (5th Cir. 1990) 7

FEDERAL STATUTES

8 U.S.C. § 1101(a)(42)(A) 2

8 U.S.C. § 1105a(a) 4

8 U.S.C. § 1158(a) 2

28 U.S.C. § 1254(a) 2

TABLE OF AUTHORITIES – Continued

Page

IMMIGRATION AND NATIONALITY ACT OF 1990

108(a) 2

208 ..... 2, 3, 7

COURT RULES

Fed Rules of Appellate Procedure 41 6

Sup. Ct. R. 20.1 2

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES,

MAY IT PLEASE THE COURT,

Petitioner, Rodrigo Reyes, respectfully prays that a Writ of Certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit entered in this matter on March 1, 1996.

OPINIONS AND JUDGMENTS BELOW

The opinion and judgment of the three-judge panel of the United States Court of Appeals for the Fifth Circuit, entered March 1, 1996, are reprinted in the Appendix to the Writ at pages App. 1 through App. 2. The decision and order of the Board of Immigration Appeals, dated May 5, 1995, are reprinted in the Appendix to this Writ at pages App. 4 through App. 7. The decision and order of the Board of Immigration Appeals, dated December 12, 1994, are reprinted in the Appendix to this Writ at pages App. 12 through App. 14. The summary of the order and decision of the Immigration Judge, dated December 17, 1990, is reprinted in the Appendix to this Writ at page 15.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on March 1, 1996, affirming the Board of Immigration Appeals' decision dated May 5, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(a) and Sup. Ct. R. 20.1.

STATUTES AND REGULATIONS INVOLVED

This case involves the following provisions of the United States Code:

Title 8 U.S.C. § 1158(a):[1]

The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of Section 1101(a)(42)(A) of this title.

Title 8 U.S.C. § 1101(a)(42)(A):[2]

The term "refugee" means any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and is unable or unwilling to return to, and is unable or unwilling to

---

[1] Referred to throughout this Writ as Section 208 of the Immigration and Nationality Act.

[2] Referred to throughout this Writ as Section 108(a) of the Immigration and Nationality Act.

avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

STANDARD OF REVIEW

Courts review the question of whether a party has established a *prima facie* case for the underlying substantive relief sought in a motion to reopen subject to an abuse of discretion standard. *I.N.S. v. Wang*, 450 U.S. 139 (1981); *see also Dulane v. I.N.S.*, 46 F.3d 988 (10th Cir. 1995); *Limsico v. U.S. I.N.S.*, 951 F.2d 210, 213 (9th Cir. 1991); *M.A. v. I.N.S.*, 899 F.2d 304, 307-310 (4th Cir. 1990) (en banc). The Supreme Court has expressly stated that the abuse of discretion standard of judicial review applies to motions to reopen claims for asylum under INA § 208, 8 U.S.C. § 1158. *I.N.S. v. Doherty*, 502 U.S. 314, 116 L.Ed 2d 823, 112 S.Ct. 719 (1992).

For the purpose of granting asylum, the factual determination concerning the applicant's well-founded fear of persecution is reviewed under the "substantial evidence" test set forth in *I.N.S. v. Elias-Zacarias*, 112 S.Ct. 812, 815, 817 (1992)

STATEMENT OF THE CASE

I. Basis for Federal Jurisdiction in the Court of First Instance

Petitioner herein, Rodrigo Reyes, seeks review of the decision by the United States Court of Appeals for the Fifth Circuit on his Petition for Review taken from the administrative decisions by the Board of Immigration Appeals (hereinafter "BIA") in deportation proceedings. The Fifth Circuit's jurisdiction was invoked under 8 U.S.C. § 1105a(a), which establishes the exclusive procedure for judicial review of such administrative decisions.

II. Statement of the Facts

Petitioner Rodrigo Martin Reyes is a native and citizen of Nicaragua. Born on November 2, 1970, in Managua, he had lived there his entire life, with but two exceptions. Following training as an x-ray technician in Rivas, Nicaragua, from January until December, 1986, the Respondent was drafted into the Sandinista Popular Army. He was assigned to Sandinista People's Army Unit 32-33 in Northern Nicaragua, and six months later he was assigned to a Sandinista Special Forces unit. The Petitioner served in a Sandinista Special Forces unit, which fought in the Nicaraguan countryside from January 1988, until January, 1989. The Petitioner subsequently deserted his Sandinista Special Forces unit, as he could no longer bear to watch the gross acts of inhumanity and atrocities committed by his military superiors and fellow soldiers against the civilian population. Further, the Respondent had witnessed, on four separate occasions, six of his

fellow soldiers extrajudicially tortured and then executed by Sandinista officers as punishment for desertion.

Despite the severe penalty which he would suffer for desertion, the Respondent deserted the Sandinista Army on January 1, 1988. Petitioner's escape was helped in large measure by the fact that the officers of his unit were away celebrating the New Year, and the Petitioner left his unit at this opportunity. The Petitioner made his way through Honduras, El Salvador, Guatemala, and Mexico, before entering the United States on or about January 23, 1989, near Laredo, Texas.

III. Course of proceedings and disposition in the Court below.

In deportation proceedings before the Executive Office for Immigration Review on May 30, 1989, the Petitioner was ordered deported *in absentia* by the Immigration Judge. Petitioner was represented by other counsel at that time, and it was contended that Petitioner never received notice of the hearing and did not learn of the deportation order until the previous counsel telephoned the Immigration Court in San Antonio, Texas. The Petitioner, through the other counsel, then moved to reopen the proceedings. At a subsequent deportation hearing on March 23, 1990, the Petitioner admitted the allegations in the Order to Show Cause and conceded deportability. At a hearing on the merits on December 13, 1990, the Immigration Judge denied the Petitioner's applications for asylum and withholding deportation. However, the Immigration Judge did find the Petitioner and his witness, a former Nicaraguan military leader, General

Bayardo Jiron, to be "credible," but the Judge took administrative notice of the then new administration in Nicaragua, and denied the applications for relief. The Petitioner, through other counsel, appealed the Immigration Judge's decision to the Board of Immigration Appeals (BIA) on April 23, 1991. On December 12, 1994, the BIA dismissed the Petitioner's appeal. The gist of that decision was that prosecution for desertion from a national armed forces is not an adequate basis for finding a well-founded fear of persecution under the Immigration and Nationality Act (INA).

The Petitioner then filed a Motion to Reopen and Reconsider with the BIA, based on new and additional evidence, concurrently with a Petition for Review and a Motion to Hold in Abeyance with the United States Court of Appeals for the Fifth Circuit. On May 5, 1995, the BIA denied the Motion to Reopen and Reconsider. On June 1, 1995, the Petitioner filed a second Petition with the Fifth Circuit for review of the BIA's denial of his Motion to Reopen and Reconsider. On June 28, 1995, the INS moved the Fifth Circuit to consolidate the two petitions for review (Nos. 95-60016 & 95-60327). That motion was granted on July 18, 1995. On March 1, 1996, in a *per curiam* decision, the Fifth Circuit Court of Appeals denied the petition. Pursuant to Federal Rule of Appellate Procedure 41 the Fifth Circuit's mandate is scheduled to issue 52 days from the date that the petition was denied.

ARGUMENT FOR ALLOWANCE OF THE WRIT

I. THE BOARD OF IMMIGRATION APPEALS ERRED IN FINDING THAT THE IMMIGRATION JUDGE WAS CORRECT IN DISMISSING THE PETITIONER'S REQUEST FOR ASYLUM AND WITHHOLDING OF DEPORTATION PURSUANT TO § 208 OF THE IMMIGRATION AND NATIONALITY ACT SINCE THE PETITIONER CONCLUSIVELY ESTABLISHED A WELL-FOUNDED FEAR OF PERSECUTION.

In dismissing Mr. Reyes' petition, the Court of Appeal relied on *Faddoul v. I.N.S*, 37 F.3d 185 (5th Cir. 1994), as precedent for interpretation of INA § 208. The factual determination concerning the applicant's well-founded fear is reviewed under the "substantial evidence" test. *I.N.S. v. Elias-Zacarias*, 112 S.Ct. 812, 815, 817 (1992); *Zamora-Morel v. I.N.S.*, 905 F.2d 833, 837-38 (5th Cir. 1990). The substantial evidence test traditionally has required that the agency rely on more than a "scintilla" of evidence and that it must be "such relevant evidence as a reasonable mind might accept to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 299 (1938). The ultimate decision to grant asylum to a person who has a well-founded fear is reviewed under the abuse of discretion standard. *Rojas v. I.N.S.*, 937 F.2d 186, 189-90 (5th Cir. 1991).

Recently, the Tenth Circuit Court of Appeals, in a case strikingly similar to the instant case, determined that the Board of Immigration Appeals denied due process in three instances to a Nicaraguan family, the father of whom had opposed the Sandinistas, by: (1) overturning

the Immigration Judge's finding that the aliens had established a well-founded fear of persecution, based solely on administrative notice that the Sandinistas no longer controlled the Nicaraguan government; (2) not giving the aliens notice and an opportunity to be heard prior to taking such administrative notice; and (3) failing to give the aliens' case individualized consideration and instead using a "boilerplate" rejection of their appeal. *de la Llana-Castellon v. I.N.S.*, 16 F.3d 1093 (10th Cir. 1994). Although the BIA in that case did not err in taking administrative notice of the April, 1990 election in Nicaragua, the formation of a non-Sandinista coalition government, and the inauguration of Mrs. Violeta Chamorro as President, it did err in concluding that the Sandinistas are no longer "in control" of that country, as leading newspapers and the United States State Department Country Report for Nicaragua note that the Sandinistas remain in control of the Nicaraguan army and police forces, and that numerous politically-motivated killings continue to occur. *Id.*

The Petitioner has proffered more than ample evidence that he will be persecuted for his ardent anti-Sandinista beliefs if returned to Nicaragua. Mr. Bayardo Jiron, a former general in the Nicaraguan army and chief of the Nicaraguan national security agency[3] prior to the Sandinista's violent seizure of power in 1979, testified on behalf of the Petitioner at the December 13, 1990 asylum hearing. Mr. Jiron, who has been granted asylum in the United States, testified to the existence of clandestine

---

[3] The Nicaraguan equivalent to the United States Central Intelligence Agency and Federal Bureau of Investigation.

prisons in Nicaragua "into which people disappear, eventually where people are killed, and, although the president now in power criticizes general wrongdoing, she never touches on these matters." (from the Transcript of the December 13, 1990 Hearing on the Merits). Mr. Jiron's testimony is clearly consistent with the findings of the Tenth Circuit in *de la Llana-Castellon, supra,* and the Immigration Judge noted in his decision that he believed Mr. Jiron to be a "very honest and very honorable person," thus adding to the credibility of the testimony. (December 13, 1990 Decision of the Immigration Judge). The refusal of the BIA to reopen an alien's deportation proceeding to allow the renewal of an application for asylum and consideration of an application for withholding of deportation is not an abuse of discretion where the alien fails to make a prima facie showing of entitlement to eligibility for the relief requested. *Yousif v. I.N.S.,* 794 F.2d 236 (6th Cir. 1986). However, unless the alien's factual assertions are inherently unbelievable, the Court of Appeals must, in reviewing a denial of a motion to reopen a deportation hearing to apply for political asylum, accept as true the facts as stated in the alien's affidavit and supporting documents. *M.A. v. I.N.S.,* 899 F.2d 304, 307-310 (4th Cir. 1990) (en banc).

Despite the testimony of Mr. Jiron, the BIA agreed with the findings of the Immigration Judge. In his decision, the Immigration Judge took administrative notice of several events which have occurred in Nicaragua: (1) that the Sandinista Party no longer controls the Nicaraguan government; (2) that a new coalition government known as UNO has succeeded the former government; (3) that national elections have been held and, as a result, Mrs.

Chamorro was elected president; and (4) that Mrs. Chamorro subsequently announced amnesty for army deserters. It appears that the Immigration Judge committed a clear reversible error in taking administrative notice that the Sandinista are no longer "in control" of Nicaragua. This is contrary to all testimony put forth by Petitioner, the United States State Department Country Report on Nicaragua, and the Tenth Circuit's findings in *de la Llana-Castellon, supra*. Further, Mr. Jiron's testimony repudiates the last finding of the Immigration Judge in that, while the official government policy may be that of amnesty, the Sandinista-controlled army and police forces still have a free hand to violate the human rights of those individuals it deems opposed to its views. Yet, the Immigration Judge then concluded that "because of the significant change of events in Nicaragua, there's been a significant difference." This finding formed the basis of the Immigration Judge's rejection of Petitioner's asylum request.

The Petitioner submits that a careful examination of the record will result in a finding by this Court that the instant case was decided by the Immigration Judge against the clear weight of the evidence of Petitioner's well-founded fear of persecution. Therefore, the Board of Immigration Appeals abused its discretion in affirming the decision of the Immigration Judge.

CONCLUSION

For the reasons set forth hereinabove, a Writ of Certiorari should issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully Submitted,

LAWRENCE B. FABACHER, II
833 Baronne Street
New Orleans, LA 70113
(504) 522-2800

Attorney of Record for
Petitioner Rodrigo Martin Reyes

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-60016
No. 95-60327
(Summary Calendar)

RODRIGO MARTIN REYES,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order
of the Board of Immigration Appeals
(BIA No. A29-322-056)

(Filed Mar. 1, 1996)

Before WIENER, PARKER and DENNIS, Circuit Judges.

PER CURIAM:*

Rodrigo Martin Reyes seeks review of the decisions of the Board of Immigration Appeals denying his motions for asylum and for reopening of his asylum hearing. Reyes contends that he has shown a well-founded fear of

---

* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

persecution should he return to Nicaragua and contends that the Board should have reopened his asylum hearing based on evidence he submitted in conjunction with his motion to reopen. We have reviewed the record and the briefs of the parties and we find the decision denying Reyes's motion for asylum is supported by substantial evidence. *Faddoul v. INS*, 37 F.3d 185, 188 (5th Cir. 1994). There was no abuse of discretion in denying Reyes's motion to reopen his asylum proceedings. *See INS v. Doherty*, 502 U.S. 314, 323 (1992).

PETITION DENIED.

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of Board of Immigration Appeals

File: A29 322 056 – New Orleans

Date: MAY – 5 1995

In re: RODRIGO MARTIN *REYES*

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:
Jeri Ann H. Flynn, Esquire
P.O. Box 14958
3112 Valley Creek Drive, Suite D
Baton Rouge, Louisiana 70808

ON BEHALF OF SERVICE:
Dorcas Alayne Jones
General Attorney

CHARGE:

Order: Sec. 241(a)(2), I&N Act [8 U.S.C. § 1251(a)(2)] – Entered without inspection

APPLICATION: Asylum; withholding of deportation

This case first came before us on appeal from the December 13, 1990, decision of the immigration judge. In an order dated December 12, 1994, we dismissed the respondent's appeal on the ground that he had failed to establish eligibility for asylum and withholding of deportation under sections 208 and 243(h) of the Immigration

and Nationality Act, 8 U.S.C. §§ 1158 and 1253(h). Our decision is currently pending review before the United States Court of Appeals for the Fifth Circuit. During the pendency of his appeal, the respondent has moved alternatively to reopen these deportation proceedings for the inclusion of new evidence, to reconsider our earlier decision, or to remand to the immigration judge for further proceedings. The Immigration and Naturalization Service has indicated its opposition to the instant motions.

Motions to reopen shall not be granted unless it appears to the Board that the evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing. 8 C.F.R. § 3.2. Further, a motion to reopen shall not be granted unless it states the new facts to be proved and is supported by affidavits or other evidentiary material. 8 C.F.R. §§ 3.8(a); 103.5(a). The new facts alleged must be sufficient, if proved, to change the result of the previous decision, that is, a prima facie showing must be made, both that the alien is statutorily eligible for the relief sought and that he warrants that relief in the exercise of discretion. *See INS v. Doherty*, 112 S. Ct. 719 (1992); *INS v. Abudu*, 485 U.S. 94 (1988); *INS v. Bagamasbad*, 429 U.S. 24 (1976); *Matter of Leon-Orosco and Rodriguez-Colas*, 19 I&N Dec. 136 (BIA 1983; A.G. 1984); *Matter of Martinez-Romero*, 18 I&N Dec. 75 (BIA 1981), *aff'd*, 692 F.2d 595 (9th Cir. 1982); *Matter of Rodriguez-Vera*, 17 I&N Dec. 105 (BIA 1979).

In *Matter of Coelho*, Interim Decision 3172 (BIA 1992), we analyzed the Supreme Court's decision in *INS v. Doherty* and observed that the Court had again reemphasized the discretionary nature of motions to reopen and that the

Attorney General has broad discretion to grant or deny same. *Id.* at 724; *INS v. Rios-Pineda*, 471 U.S. 444, 449; *INS v. Phinpathya*, 464 U.S. 183, 188 n.6 (1984); *see also INS v. Wang*, 450 U.S. 139, 143 n.5 (1981) (per curiam). The Supreme Court also reiterated that motions for reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty, supra*, at 724-25; *see also INS v. Abudu, supra; INS v. Rios-Pineda, supra.* Thus, we concluded, the party seeking reopening of proceedings bears a "heavy burden." *Matter of Coelho, supra; see also INS v. Abudu, supra*, at 110.

The Court has also held that at least three independent grounds exist upon which this Board may deny a motion to reopen. *INS v. Doherty, supra*, at 725; *INS v. Abudu, supra*, at 104-05. First, this Board may deny a motion to reopen based upon the movant's failure to establish a prima facie case for the relief sought. *INS v. Doherty, supra*, at 725; *see also INS v. Abudu, supra; INS v. Wang, supra; Yousif v. INS*, 794 F.2d 236 (6th Cir. 1986); *Bahramnia v. United States INS*, 782 F.2d 1243 (5th Cir.), *cert. denied*, 479 U.S. 930 (1986); *Matter of Coelho, supra; Matter of Ruiz*, Interim Decision 3116 (BIA 1989); *Matter of Egbunine*, 19 I&N Dec. 478 (BIA 1987); *Matter of Tuakoi*, 19 I&N Dec. 341 (BIA 1985); *Matter of Reyes*, 18 I&N Dec. 249 (BIA 1982); *Matter of Martinez-Romero, supra.* Second, the Board must deny a motion to reopen in the absence of previously unavailable, material, evidence. 8 C.F.R. § 3.2 (1992). Finally, a motion to reopen may be denied in the exercise of discretion or, where the ultimate form of relief is discretionary, the Board may pretermit such a motion

upon a finding that the underlying relief requested would be denied as a matter of discretion. *INS v. Doherty, supra,* at 725; *INS v. Bagamasbad, supra; Hibbert v. INS,* 554 F.2d 17, 21-22 (2d Cir. 1977); *Matter of Reyes, supra.*

The respondent has also filed a concurrent motion to reconsider our earlier decision. Motions to reopen and motions to reconsider are fundamentally different motions that have fundamentally different requirements. *See Chudshevid v. INS,* 641 F.2d 780 (9th Cir. 1981). A motion to reconsider by regulation must state the reasons upon which the motion is based and be supported by such precedent decisions as are pertinent. 8 C.F.R. § 3.8(a) (1993). The differences between motions to reopen and motions to reconsider are fully set forth in this Board's decision in *Matter of Cerna,* Interim Decision 3161 (BIA 1991), in which we stated:

> A motion to reconsider asserts that at the time of the Board's previous decision an error was made. It 'questions the Board's decision for alleged errors in appraising the facts and the law.' When we reconsider a decision, we are in effect placing ourselves back in time and considering the case as though a decision in the case in the record before us had never been entered. . . . The very nature of a motion to reconsider is that the original decision was defective in some regard. A motion to reopen proceedings, however, is a fundamentally different motion. It does not contest the correctness of (or simply request a reevaluation of) the prior decision on the previous factual record. Rather a motion to reopen proceedings seeks to reopen proceedings so that new evidence can be presented and so

> that a new decision can be entered, normally after a further evidentiary hearing.

Id. at 5-6 (footnote and citations omitted).

We shall first address the respondent's motion to reconsider. The respondent alleges two legal errors on our part in our earlier decision: first, that we erroneously characterized the election of Violeta Chamorro and the defeat of the Sandinista party as an "improvement" in the human rights situation in Nicaragua, and second, that we confused the respondent's status as a deserter with that of a draft evader in noting that mandatory military conscription had been abolished in that country.

With respect to the first allegation of error, the respondent is in essence mixing his motions. In our decision, we did not specifically address the issue of any changes in the human rights scenario in Nicaragua; instead, we adopted the immigration judge's findings in this regard. He, in turn, found the respondent's claim that he would be persecuted for deserting from the Sandinista army to be unpersuasive in light of the announced amnesty for deserters from the Chamorro government. The respondent on appeal claimed that this finding was in error on the basis of the testimony of his witness, who had noted that the army was still in Sandinista control. The immigration judge, however, had noted that the witness had not returned to Nicaragua himself, but was relying on information from persons engaged in trying to recover his real property in that country, which had previously been appropriated by the Sandinista government.

On the basis of the above, we find no error with respect to the immigration judge's decision. The respondent did not at the hearing or on appeal introduce evidence to establish that the pardon for deserters was not effective. While it is undisputed that Humberto Ortega, brother of former Sandinista leader Daniel Ortega, was still head of the Sandinista army at the time of the hearing below, it does not follow that the amnesty was not being honored. To the extent that the respondent is claiming that the amnesty may preclude his prosecution, but not his persecution as a deserter, we find no probative evidence in the record before the immigration judge that the Sandinista authorities would seek out the respondent for harm as a result of his desertion in spite of the existing amnesty. This aspect of the respondent's allegation of error is accordingly without merit.

The respondent's second claim of error must also be rejected. In our decision, we specifically noted that fear of punishment for desertion, without more, was not a qualifying ground for asylum in the United States. We did add that the respondent had not rebutted the immigration judge's finding that mandatory military service was no longer required in Nicaragua. However, this fact is relevant to the respondent's claim, not renewed at present, that his conscientious objector status rendered him eligible for asylum, because no realistic likelihood existed of further military service on the respondent's part upon return to Nicaragua. Since the remainder of the respondent's claims relate to evidence not in the record or conditions subsequent to the hearing, they are properly the subject of his motion to reopen, considered below.

The respondent's motion to reconsider is accordingly denied.

With respect to the alternative motions to reopen or remand,[1] the respondent reiterates the allegations of past persecution made before the immigration judge and submits several news articles from 1991 and 1992, and the *Country Reports on Human Rights Practices* relating to Nicaragua for the years 1991-93 and *Amnesty International* reports for 1991-94. In addition, the respondent submits a copy of an affidavit executed by his mother on February 5, 1992, while she was visiting him in this country, and which relates events after the respondent's departure from Nicaragua in early 1989.

As the Service points out in its memorandum in opposition to the instant appeal, the statements made in the mother's affidavit describe events occurring in mid- to late 1989, well before the hearing below which concluded on December 13, 1990. This affidavit, although made subsequent to that hearing, does not contain evidence that clearly could not have been produced or discovered prior to the hearing. This document accordingly is not properly the subject of a motion to reopen. 8 C.F.R. § 3.2.

With respect to the news articles and human rights reports submitted with the motion to reopen, these documents, unlike the affidavit, were not available at the

---

[1] The requirements for a motion to reopen or to remand are identical for our purposes and these motions shall accordingly be considered as one. *See Rodriguez v. INS*, 841 F.2d 865 (9th Cir. 1987).

hearing. The events described therein, however, i.e., the continuing turmoil in Nicaragua, do not alter either our analysis or that of the immigration judge regarding the well-founded nature of the respondent's fear of persecution on account of a qualifying ground for asylum. Furthermore, the conditions described in those documents do not seem to differ much from those obtaining at the time of the hearing. It may well be true that certain individuals, (especially prominent former leaders of the Nicaraguan resistance to the Sandinista government) have been harmed or killed for political reasons in that country, but we find no evidence of persecution, systemic or episodic, of persons situated similarly to the respondent, i.e., deserters from the former Sandinista army returning from abroad. We are accordingly unable to conclude that the conditions in Nicaragua have changed to the extent that a reconsideration of the respondent's claims is warranted at the present time. The respondent's motions to reopen or remand must therefore also be denied on this ground.[2] The following orders shall accordingly be entered.

---

[2] Although the motions to reopen/remand and reconsider must be denied for the reasons set forth above, we also note that the respondent had most of this information available to him 3 years ago, and apparently all of it before our December 1994 adjudication of his appeal. No explanation has been proffered for the respondent's decision not to earlier submit this evidence in the context of a motion to remand, a fact particularly striking with regard to the affidavit of the respondent's mother, executed before respondent's counsel in February 1992. With respect to the discretionary aspects of motions to reopen or reconsider, we view with considerable disfavor piecemeal litigation which serves only to prolong deportation proceedings. *See generally Stone v. INS*, 13 F.3d

ORDER: The motion to reopen or, in the alternative, remand the record to the immigration judge, is denied.

FURTHER ORDER: The motion to reconsider is denied.

/s/ Mary Maguire Dunne
FOR THE BOARD

---

934 6th Cir. 1994), *citing Hyun Joon Chung*, 720 F.2d 1471 (9th Cir.) *cert. denied*, 467 U.S. 1216 (1984).

U.S. Department of of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of Board of Immigration Appeals

File: A29 322 056 – New Orleans

Date: DEC 12 1994

In re: RODRIGO MARTIN *REYES*

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Jeri Ann H. Flynn, Esquire
P.O. Box 14958
3112 Valley Creek Drive, Suite D
Baton Rouge, Louisiana 70808

ON BEHALF OF SERVICE:
Agnelis L. Reese
General Attorney

CHARGE:

Order: Sec. 241(a)(2), I&N Act [8 U.S.C. § 1251(a)(2)] – Entered without inspection

APPLICATION: Asylum; withholding of deportation

ORDER:

PER CURIAM. The appeal is dismissed. We have reviewed the record of proceedings, the immigration judge's decision, and the respondent's contentions on appeal. We find that the bulk of the respondent's legal

arguments have been rejected since the immigration judge's decision below. *Canas-Segovia v. INS*, 902 F.2d 717 (9th Cir. 1990), cited in the respondent's brief in support of the instant appeal, was vacated by the Supreme Court and remanded for further consideration in light of its decision in *INS v. Elias-Zacarias*, 502 U.S. 478 (1992). On remand, the court found that conscientious objector status did not, without more, constitute a ground for asylum in the United States. *Canas-Segovia v. INS*, 970 F.2d 599 (9th Cir. 1992).

With respect to the respondent's claim that he would be persecuted if returned to Nicaragua for his desertion from the armed forces, it is well-established that punishment for such an action, unless administered solely on a qualifying ground for asylum, i.e., race, religion, nationality, membership in a particular social group, or political opinion, is not an adequate basis for a finding of a well-founded fear of persecution under the immigration laws. *See generally Matter of Vigil*, 19 I&N Dec. 572 (BIA 1988); *Matter Of A-G-*, 19 I&N Dec. 502 (BIA 1987); *aff'd sub nom. M.A. A26851062 v. INS*, 899 F.2d 304 (4th Cir. 1990) (en banc). We would further note that the respondent failed both below and on appeal to rebut the immigration judge's finding that mandatory military service in Nicaragua had been abolished. *See Gutierrez-Rogue v. INS*, 954 F.2d 769 (D.C. Cir. 1992); *Rivera-Cruz v. INS*, 948 F.2d 962 (5th Cir. 1991); *Matter of H-M-*, Interim Decision 3204 (BIA 1993); *Matter of R-O-*, Interim Decision 3170 (BIA 1992).

After review of the record, and in light of the above decision, we conclude that the immigration judge adequately and correctly addressed the remainder of the

issues raised on appeal in his decision below and will accordingly affirm the same for the reasons set forth therein. The respondent's request for oral argument is denied.

FURTHER ORDER: Pursuant to the immigration judge's order and in accordance with our decision in *Matter of Chouliaris*, 16 I&N Dec. 168 (BIA 1977), the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director. In the event of the respondent's failure so to depart, he shall be deported as provided in the immigration judge's order.

/s/ Mary Maguire Dunne
FOR THE BOARD

"CORRECTED COPY"

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
OAKDALE, LA

File: A 29-322-056
In DEPORTATION
Proceedings

In the Matter of:
REYES, RODRIGO MARTIN

Order of the
Immigration Judge

This is a summary of the Oral Decision and Order entered on 12/13/90. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed, the Oral Decision and Order will be transcribed and will become the official opinion in this case.

_____ The Respondent's application for Voluntary Departure was denied and he/she was ordered deported to NICARAGUA.

__X__ Respondent's application for Voluntary Departure was granted to on or before 30 July 1991 with an alternated Order of Deportation to Nicaragua.

__X__ Respondents application for ASYLUM was ~~Granted~~/Denied. WITHHOLDING OF DEPORTATION was ~~Granted~~/Denied.

_____ A waiver under Sec. 212 (c) was Granted/Denied.

_____ The Respondent was Granted/Denied adjustment of status.

_____ The Respondent's application for suspension of deportation is hereby Granted/Denied.

_____ The proceedings were terminated.

____ The Respondent was ordered deported to NICARAGUA.

__X__ Appeal reserved/waived by ~~Service~~/Respondent. Notice of Appeal to be filed no later than 24 Dec 1990..

____ Other _____

_____.

Date: 12/17/90

/s/ R Kevin McHugh
R. KEVIN MCHUGH
Immigration Judge AU

"CORRECTED COPY"